(1) No.

Supreme Court, U.S.
FILED

JUL 25 1994

IN THE 94 167

Supreme Court of the United States

OCTOBER TERM, 1993

KATIA GUTIERREZ DE MARTINEZ, EDUARDO MARTINEZ PUCCINI, AND HENNY MARTINEZ DE PAPAIANI,

Petitioners,

v.

DIRK A. LAMAGRO, THE DRUG ENFORCEMENT ADMINISTRATION, AND THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Isidoro Rodriguez, Esq.

Attorney for Petitioners
Law Offices of Isidoro Rodriguez, P.C.
Calle 84, No. 56-51
Barranquilla, Colombia
(011)57-58-561678/458273

57 pp

QUESTIONS PRESENTED FOR REVIEW

I. WHERE A CERTIFICATION OF SCOPE OF EMPLOYMENT UNDER 28 U.S.C. § 2679-(d)(1)(WESTFALL ACT) HAS BEEN ISSUED, DO THE INJURED PARTIES IN THE AUTOMOBILE ACCIDENT HAVE A RIGHT TO DE NOVO JUDICIAL REVIEW BY THE DISTRICT COURT TO THE CHALLENGE THAT THE CONDUCT OF THE FEDERAL EMPLOYEE WAS NOT OCCURRING WITHIN THE SCOPE OF HIS EMPLOYMENT AT THE TIME OF THE ACCIDENT, AND THEREBY A SUIT AGAINST HIM IN HIS INDIVIDUAL CAPACITY IS PERMITTED?

II. WHETHER THE INJURED PARTIES IN AN AUTOMOBILE ACCIDENT OCCURRING IN THE REPUBLIC OF COLOMBIA, HAVE A JUDICIALLY ENFORCEABLE RIGHT TO COMPENSATION UNDER 21 U.S.C. § 904?

LIST OF PARTIES

The parties that have appeared here include those listed on the case caption.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution and Statutes:

Legislative History:

No._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

KATIA GUTIERREZ DE MARTINEZ, EDUARDO MARTINEZ PUCCINI, AND HENNY MARTINEZ DE PAPAIANI,

Petitioners,

v.

DIRK A. LAMAGNO, THE DRUG ENFORCEMENT ADMINISTRATION, AND THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CITATIONS TO OPINIONS BELOW

The April 20, 1993, bench decision of the United States District Court for the Eastern District of Virginia is

unreported, and is reproduced in the appendix to this petition at App. 1-a.

The opinion of the United States Court of Appeal for the Fourth Circuit issued on April 28, 1994, is unpublished and is reproduced in the appendix to this petition at App. 1-b.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on April 28, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTES INVOLVED

21 U.S.C. § 904
Payment of Tort Claims

Notwithstanding section 2680 (k) of Title 28, the Attorney General, in carrying out the functions of the Department of Justice under this subchapter, is authorized to pay tort claims in the manner authorized by section 2672 of Title 28, when such claims arise in a foreign country in connection with the

operation of the Drug Enforcement Administration abroad.

28 U.S.C. § 2679
Exclusiveness of remedy

(d)(1) Upon a certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attor-

ney General shall conclusively establish scope of office or employment for purposes of removal.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

STATEMENT OF THE CASE

A. JURISDICTION BELOW

Claims for damages were filed by Mrs. Katia Gutierrez de Martinez, Eduardo Martinez Puccini, and Henny Martinez de Papaiani, (hereinafter "Injured Parties") against Mr. Dirk A. Lamagno (hereinafter "Mr. Lamagno"), in his individual capacity based on diversity of citizenship pursuant to 28 U.S.C. § 1332(a)(2).

Also the action was filed against the Drug Enforcement Administration

(hereinafter "DEA") and the United States pursuant to 28 U.S.C. § 1346(b).

Appellate jurisdiction was invoked pursuant to 28 U.S.C. § 1291.

B. RELEVANT FACTS

Police reports show that on Friday night, at 11:45 p.m. on January 18, 1991, Mr. Lamagno was driving away from his hotel under the influence of alcohol, and in the company of an unidentified female passenger, in a 1987 Silver Blue Ford Bronco, identified by non-diplomatic license plates No. LK 9264.

Police reports further show that Mr. Lamagno failed to stop at a marked intersection at Calle 85, with Kra. 47, in the City of Barranquilla, Colombia; and midway through the intersection, suddenly struck the left side of the new 1990 Renault driven by the Injured Par-

ties. The force of the impact of Mr. Lamagno's armored vehicle totally destroyed the 1990 Renault.

After the collision the Injured Parties were trapped in their totally demolished Renault for 45 minutes in the following conditions: Mrs. Katia Gutierrez de Martinez, the driver, was unconscious, bleeding from facial injuries, and was further immobilized with two severely broken arms; Mr. Eduardo Martinez Puccini, was trapped in the passenger front seat unconscious and suffered bleeding cuts; and Mrs. Henny Martinez de Papaiani, sitting on the right hand side of the back seat was also unconscious.

After the collision neither Mr. Lamagno, nor his unidentified female passenger, left their vehicle to render

assistance to the Injured Parties. Later unknown persons, identifying themselves as representatives of the United States Consulate in Barranquilla, Colombia, arrived and entered into a discussion with local police to permit their taking Mr. Lamagno and the unidentified female passenger from the scene of the accident, and removing and replacing the non-diplomatic license plates No. LK 9264, with diplomatic license plates No. CD0172.

Although the local police permitted both acts requested by said unknown persons, and accident report with the original license number was completed, and they instructed Mr. Lamagno, to appear on January 19, 1991, at 1100 hrs, at the 6th Police Inspection, to give testimony regarding the accident.

The Injured Parties were taken to the emergency ward at "Clinica del Caribe" for treatment. For the purpose of proscribing medication, it was noted by the attending physician that Mrs. Katia Gutierrez de Martinez neither had been drinking alcoholic beverages, nor had taken any medication.

Despite the order to appear on January 19, 1991, and March 7, 1991, Mr. Lamagno was taken out of the Republic of Colombia by DEA, and thus prevented the taking of his testimony to the Municipal Secretary, concerning the accident and his condition.

Based on the above facts, the police found that the accident was caused solely and exclusively due to the gross negligence of the Mr. Lamagno, who ill-

egally entered the intersection at a high rate of speed and was under the influence of alcohol.

On May 8, 1991, in accordance with 21 U.S.C. § 904, and 26 U.S.C. § 2675, an administrative claim was filed.

On May 16, 1991, the DEA notified the Injured Parties of the acceptance of their claim, and in accordance with 26 U.S.C. § 2672, the transferring the administrative claim to the Torts Division, U.S. Department of Justice.

During the next year and a half, in processing the administrative claim of the Injured Parties, the Torts Division, requested and received numerous times from the Injured Parties additional information regarding the traffic accident, and the status of their extensiveness injuries.

Prior to the running of the statute of limitation this action was filed on January 15, 1993.

On March 4, 1993, two years and two months from the date of the accident a one paragraph Certificate of Scope of Employment under 28 U.S.C. § 2679(d)(1), was issued asserting that Mr. Lamagno's actions and condition at the time of the accident fell within his "scope of employment."

On March 5, 1993, without taking any evidence to refute the Injured Parties allegations of Mr. Lamagno's driving under the influence of alcohol, or permitting any challenge to the certification of scope of employment, the District Court entered an ex parte order substituting the United States for Mr. Lamagno based on the Fourth Circuit's

holding Johnson v. Carter, 983 F.2d 1316 (1993).

On April 16, 1993, the district court granted the United States motion for summary judgment, based on the "foreign country exemption" under 28 U.S.C. § 2680(k).

On May 4, 1993, a Notice of Appeal was filed appealing the orders of March 5, and April 16, 1993.

On April 28, 1994, the Fourth Circuit affirmed the district court's holding that the certificate of scope of employment was not subject to judicial review, and that 21 U.S.C. § 904, does not alter the "foreign country exemption."

REASONS FOR GRANTING THE WRIT

I. **PRIOR TO ORDERING THE SUBSTITUTION OF THE UNITED STATES FOR MR. LAMAGNO BASED UPON THE CERTIFICATION OF SCOPE OF EMPLOYMENT ISSUED PURSUANT TO 28 U.S.C. § 2679(d)(1), THE DISTRICT COURT MUST PROVIDE A DE NOVO REVIEW TO THE INJURED PARTIES TO THE CHALLENGE THAT MR. LAMAGNO DRIVING UNDER THE INFLUENCE OF ALCOHOL, THUS WAS NOT WITHIN THE SCOPE OF HIS EMPLOYMENT.**

After receiving the administrative claim on May 8, 1991, the DEA failed to issue any certification of scope of employment under 28 U.S.C. § 2679.

Thus, based on the holding in Smith v. U.S., 762 F.Supp. 1511, at p. 1513 (D.D.C. 1991), aff'd, 957 F.2d 912 (1992), where the District Court held that, "[o]n no basis would the court conclude that drinking and driving after work hours fell within the scope of . . . employment with the DEA," the Injured

Parties filed a diversity action against Mr. Lamagno in his individual capacity.

Subsequently, twenty-six months after the accident a one paragraph certification of scope of employment was issued on March 4, 1993.

However, at no time did the DEA dispute the allegations in the complaint that Mr. Lamagno was driving recklessly and under the influence of alcohol, after normal office hours in the company of an unidentified woman.

The DEA's only argument was based on the Fourth Court's holding in Johnson v. Carter, 983 F.2d 1316 (1993), in that the certification of employment was conclusive and there is no judicial review of the substitution of the United States for Mr. Lamagno.

Based on Johnson v Carter, the district court entered an ex parte order substituting the United States and dismissing the action against Mr. Lamagno. This order was affirmed by the Fourth Circuit on April 28, 1994.

Because this holding of the Fourth Circuit is in conflict with the holding of nine other United States courts of appeal, and is wrong based on the facts of this action, a petition for writ of certiorari should be issued.

A review of Johnson v Carter, underscores the need for this Court to resolve this conflict between the circuits.

Johnson v Carter, involved an Admiral who was named as defendant in libel and slander suit by base a police officer for an incident when admiral alleg-

edly called officer a "liar," the Fourth Circuit held that a certification by Attorney General that admiral was acting within scope of employment was conclusive under the Federal Employees Liability Reform and Tort Compensation Act.

The Fourth Circuit held that 28 U.S.C. § 2679(d)(2) (hereinafter the "Westfall Act"), was passed by Congress to change the rule set out in the Supreme Court's decision in Westfall v. Erwin, 484 U.S. 292, 108 S.Ct. 580 (1988). In Westfall, this Court held that the judicially created doctrine of official immunity did not provide blanket protection to government employees for torts committed in the scope of their employment.

The Westfall Act grants immunity to the government employee acting within

the scope of their employment by requiring persons injured by them to substitute the government as the defendant.

In its holding, the Fourth Circuit does not accept the claim that since 28 U.S.C. § 2679(d)(1), does not contain the statement contained in 28 U.S.C. § 2679(d)(2), that the "certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal," de novo review of the certification was required by the district court except for removal.

The Fourth Circuit further rejects the legislative history, wherein Congressman Frank, the Act's sponsor, stated that "the plaintiff would still have the right to contest the certification if they [sic] thought the Attorney General were [sic] certifying without justification." Legislation to Amend the Federal Tort Claims Act: Hearing Before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary, 100th Cong., 2d Sess. 60, 128 (April 14, 1988). In addition, the Department of Justice representative, Deputy Assistant Attorney General Robert Willmore, who appeared at the Congressional hearing and stated that "Chairman Frank is correct that a plaintiff can challenge that certification. So that would be reviewable by a court at some point, probably by a Federal District Court." Legislation to Amend the Federal Tort Claims Act: Hearing, at 133.

However, the Fourth Circuit's holding in both Johnson v Carter and in this case, is in direct conflict with

nine other circuit courts that have addressed the reviewability of disputed scope-of-employment certifications and have uniformly held them to be subject to review.

The nine other circuits holding is well stated in the Second Circuit opinion in McHugh v. University of Vermont, 966 F.2d 67 (2nd Cir. 1992), which involved a sexual harassment suit against Lt. Col. by a secretary at University of Vermont, wherein that circuit court held that "[w]e believe that a scope-of-employment certification should be reviewed be reviewed de novo for purposes of substituting the United States as a defendant and precluding an action against the federal employee." at Id. p. 72. See North Shore Shipping Co. v United States, No. 92-3730, 8 WL 141054

1993 U.S.App LEXIS 89 (6th Cir. 1993) (scope certification subject to review by district court); Arbour v. Jenkins, 903 F.2d 416 (6th Cir. 1990); Schrob v. Catterson, 967 F.2d 929 (3d Cir. 1992) (Attorney General's scope of employment not conclusive and non reviewable); Snodgrass v Jones, 957 F.2d 482 (7th Cir. 1992) (Attorney General's scope of employment certification subject to de novo review); S.J. & W Ranch, Inc. v. Lehtinen, 913 F.2d 1538 (11th Cir. 1990)(district court should exercise de novo review of certification decision); Melo v. Hafer, 912 F.2d 628 (3rd Cir. 1990) (district court may review scope of employment certification decision), aff'd on separate grounds, __ U.S. __, 112 S.Ct. 358, 116 L.Ed.2d 301(1991); Nasuti v. Scannell, 906 F.2d 802 (1st

Cir. 1990) (district court should exercise its customary jurisdiction over scope-of-employment disputes that call into question its subject matter jurisdiction); Brown v. Armstrong, 949 F.2d 1007 (8th Cir. 1991); Meridian Intern. Logistics, Inc. v. United States, 939 F.2d 740 (9th Cir. 1991); Hamrick v. Franklin, 931 F.2d 1209 (7th Cir.), cert. denied ___ U.S. ___, 112 S.Ct. 200, 116 L.Ed.2d 159 (1991).

Apart from the Fourth Circuit, it can be argued that only possibly two other circuits have held that for purposes of removal substitution nonreviewable and mandatory upon certification, see Aviles v. Lutz, 887 F2d 1046 (10th Cir. 1989)(mandatory language of § 2679(d) does not permit federal court to review certification), and Mitchell v.

Carlson, 896 F2d 128, 136 (5th Cir. 1990)(district court required to substitute the United States following certification).

However, these two cases are factually distinguishable in that scope of employment was not a disputed issue.

Furthermore, in the Fifth Circuit, despite Mitchell v. Carlson recently in, a district court held that plaintiff is entitled to litigate before the district court the question of whether the employee was within the scope of his employment at the time of the incident. Dillon v. State of Miss., Military Dept., 827 F.Supp. 1258 (S.D. Miss. 1993)

Thus the Injured Parties argue that the Fourth Circuit is in error and the other nine circuits are correct in their

holding that the scope of employment certificate is subject to judicial review, based on the following:

First, Section 2679(d)(1) applies to cases filed in federal district courts, while Section 2679(d)(2) applies to those filed in state courts. Both sections provide: "Upon certification . . . the United States shall be substituted as the party defendant" (emphasis added). In addition, Section 2679(d)(2) provides: "Upon certification . . . [the claim] shall be removed . . . to the district court" (emphasis added). Thus, in federal cases the result of certification is substitution, while in state cases it is substitution plus removal. Notably, the only mention of nonreviewability pertains to removal:

"The certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal." 28 U.S.C. § 2679(d)(2) (emphasis added).

Clearly, then, only certification for purposes of removal is nonreviewable; certification for purposes of substitution remains subject to judicial review. Had Congress intended to render the certification conclusive for purposes other than removal, it would have so stated. Cf Touche Ross & Co. v. Redington, 442 U.S. 560, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979) ("[W]hen Congress wishes to provide a private damage remedy, it knew how to do so and did so expressly." (Rehnquist, C.J.)

Second, the underlying policy consideration regarding the different ef-

fect of substitution vis-a-vis removal, supports the logical analysis of the two section to result in judicial review of the certification when substitution occurs.

Congressional rational in differentiating between the effect of certification as it relates to removal, on the one hand, and its effect on substitution, on the other, was pointed out by the Eighth Circuit in Brown v. Armstrong, 949 F.2d 1007 (8th Cir. 1991).

There the court noted that substitution will often end the plaintiff's case. However, "[t]he same concerns do not exist with automatic removal, which changes only the forum and not the substance of the case." Brown at 1011.

Third, the statutory interpretation urged by the Fourth Circuit is particu-

larly suspect because it leaves the determination of a dispositive issue in FTCA cases on an interested party. As the First Circuit cogently noted,

> it is hard to imagine Congress empowering an executive officer, the Attorney General of the United States, to displace the federal court as the final determine of the scope of employment question, thus forcing a federal court to forego determination of its own jurisdiction, and preventing the plaintiff, by executive fiat, from pursuing a possible legitimate claim in state court." Nasuti v. Scannell, 906 F2d 802, 812 (1st Cir.)

Fourth, since the Fifth Amendment protects every "person" including an alien, whether resident or nonresident, from the deprivation of life, liberty or property without due process of law, Mathews v. Diaz, 96 S.Ct. 1883 (1976), the Fourth Circuit's holding raises due process implications inherent in treating the Attorney's General scope certification as dispositive, and denying

the Injured Party a right of action against Mr. Lamagno who was driving under the influence of alcohol.

As various courts have observed, nothing in the regulation governing scope certification requires the Attorney General to conduct a neutral proceeding, open to all parties, before taking a final position on the scope question.

In the instant action these concerns are even more imperative since here the Attorney General is the boss of the DEA.

Fifth, the Westfall Act modified the Federal Drivers Act in several respects, but there is nothing to show that the right to have "the trial judge determined the scope of employment issue as a matter of law." Petrousky v. United

States, 728 F.Supp 890, 891 (N.D.N.Y.), was amended. See McGowan v. Williams, 623 F.2d 1239, 1242 (7th Cir. 1980)(citing 28 U.S.C. § 2679(d)).

Therefore there is no evidence that Congress intended to eliminate judicial determination of the scope of employment issue, except with regard to removal, as was the practice under the Federal Drivers Act. Indeed, such an elimination would be extremely anomalous in light of the Westfall Act's empowering of federal employees to challenge a refusal by an Attorney General to certify scope of employment.

Sixth, the Fourth Circuit's holding additionally lacks merit under the legal concept that in the absence or inadequacy of a specific statute, nonstatutory review is presumptively available. This

is because the non-reviewability of administrative action taken pursuant to statute or regulations is not lightly to be inferred.

Judicial review of administrative action is the rule, and non-reviewability the exception which must be demonstrated. Barlow v. Collins, 397 U.S. 159, 90 S.Ct. 832 (1970). Only on a showing of "clear and convincing evidence" will the courts restrict access to judicial review. Abbott Laboratories v. Gardner, 387 U.S. 136, 87 S.Ct. 1507, 18 L.E.2d 681 (1967); Rusk v Cort, 369 U.S. 367, 82 S.Ct. 787, 7 L.Ed.2d 809 (1962).

This is particularly true in an action based on the facts in this case, where despite complying with all the administrative procedures, the DEA has

failed to process the claim in good faith, and has interjected the absurd "James Bond Defense" that Mr. Lamagno while in the Republic of Colombia is on 24 hour call and thus all his acts are within his "scope of employment."

To this end suits seeking judicial review of federal agencies action or omissions under 28 U.S.C. § 1331 and the Administrative Procedures Act, 5 U.S.C. §§ 702 et seq., provide for declaratory and injunctive relief. Section 10 of the APA, 5 U.S.C. § 702, states that any person suffering legal wrong or adversely affected or aggrieved by an agency's action within the meaning of a relevant statute may seek judicial review thereof.

The Injured Parties argue that based on the facts presented, which must

be taken as true based on the summary judgement motion, they have met their burden of presenting "specific facts rebutting the government's scope of employment certification." Brown v Armstrong, 949 F.2d 1007 at p. 1012 (8th Cir. 1991); Hamrick v. Franklin, 931 F.2d 1209 at 1211 (7th Cir. 1991), and the district court was required to conduct at least limited judicial review of the Attorney General's scope-of-employment certification before substituting the Untied States as defendant.

Since this was not done, the Court must remand action against Mr. Lamagno in his own person based on diversity jurisdiction.

II. THE INJURED PARTIES IN AN AUTOMOBILE ACCIDENT OCCURRING IN THE REPUBLIC OF COLOMBIA HAVE A JUDICIALLY ENFORCEABLE RIGHT TO COMPENSATION UNDER 21 U.S.C. § 904.

Unless Congress expressly authorized suit against the Federal Government and its agencies, and thereby waive sovereign immunity, they are not sue and be sued entities. United States v. Testan, 424 U.S. 392, at 399 (1976).

Thus to avoid dismissal for lack of jurisdiction the Injured Parties must establish that Congress consented to suit by waiving immunity. Holloman v. Watt, 708 F.2d 1399, at 1401 (9th Cir. 1983), cert. denied. Holloman v. Clark, 466 U.S. 958, 104 S.Ct. 2168, 80 L.Ed.2d 552 (1984).

Normally a tort action against the United States would be permitted since Congress enacted the Federal Tort Claims

Act, 26 U.S.C. § 2671 et seq. (hereinafter "FTCA"), to provide the means to sue the Federal Government, and its agencies under 28 U.S.C. § 1346(b), for damages as a result of a tort.

However, FTCA is a limited waiver of sovereign immunity, and 28 U.S.C. § 2680(k) states that the Federal Government is not liable for damages for "any claim arising in a foreign country." Thus it has also been held that the District Court has no jurisdiction over any claim excluded by 28 U.S.C. § 2680-(k). United States v. Mitchell, 445 U.S. 535, at 538 (1980).

Based on the above, Drug Enforcement Administration and the United States argued that 28 U.S.C. § 2680(k), excluded an action based on a tort which occurred in the Republic of Colombia.

However, the express language of 21 U.S.C. § 904, established an exception to the exclusions under 28 U.S.C. § 2680(k), by Congress expressly authorized the compensation for tort claims for acts or omission arising in a foreign country as a result of Drug Enforcement Administration operations. Thus once the jurisdictional requirements of 28 U.S.C. § 2675 has been satisfied by the filing of the administrative claim which was accepted by DEA Headquarters and forwarded to the Tort Division, United States Department of Justice on May 16, 1991, in accordance with 28 U.S.C. § 2672, the Injured Parties claim fell under the Federal Tort Claims Act.

The DEA admit that the Injured Parties have complied with the filing of the administrative claim requirements

contained in 28 U.S.C. § 2675, when they filed a timely claim against DEA Headquarters on May 8, 1991. Also the DEA have admitted that they processed the administrative claim of the Injured Parties under 21 U.S.C. § 904. Finally, the DEA admit that the Injured Parties actively participated in supplying all information and medical reports in support of their claim.

Therefore the Fourth Circuit opinion is in error because under the provision of the FTCA once the Injured Parties filed an administrative claim with a certain sum for damages, and complied with each request for additional information in support of said claim, they more than meet the requirement of 28 U.S.C. § 2675. Thus under that section they have a right to judicial re-

view. Wellman v Gross, 637 F.2d 544 (8th Cir. 1980), cert den 102 S.Ct. 389; Lien v. Beehner, 453 F.Supp. 604 (N.D.N.Y., 1978) [action untimely even though government employment of tort feasor was shielded both from the public and the plaintiff]; Driggers v. United States, 309 F.Supp 1377 (S.C., 1970).

The DEA certified that Mr. Lamagno was acting within the scope of employment with DEA operations in the Republic of Colombia, thus the DEA became liable to suit under the FTCA, particularly since the United States places strict controls on its agents activities and use of government vehicles in foreign countries, and imposes sanctions on employees who violate said controls, See generally 31 U.S.C. § 1343 and 31 U.S.C. § 1349.

Thus in accordance with 21 U.S.C. § 904, the DEA and the United States are subject to suit for acts or omissions as a result of DEA operations in the Republic of Colombia.

CONCLUSION

The Fourth Circuit has held in this instant petition that in all instances conclusive nonreviewable effect will be given to the Attorney General's determination under 28 U.S.C. § 2679(d)(1).

The opinion of the Fourth Circuit denies to court's authority to review the decisions of the executive branch's legal office despite the unsavory appearance of unfairness that is apparent in dismissing of the instant petition given the "James Bond Defense" of the Drug Enforcement Administration, and where, as here, its decisions determine

litigation in which it is an interested party.

Quite apart from the constitutional problems of separation of powers and due process, the First, Second, Third, Fifth, Sixth, Seventh, Eight, Ninth and Eleventh Circuits on the same matter, have refused to give nonreviewable conclusive effect to the Attorney General's determination under 28 U.S.C. § 2679-(d)(1).

Thus nine other circuits have held that all of the traditional interpretative tools point to the conclusion that Congress intended in 28 U.S.C. § 2679(d)(1) the subjecting the Attorney General's certification to judicial review.

Thus this Court should grant certiorari so to resolve this dispute be-

tween the holdings in nine circuits, and that of the Fourth Circuit Court of Appeal.

Furthermore, Congress under 21 U.S.C. § 904, included within the FTCA an action against the Drug Enforcement Administration for a tort caused by that agency in its operations abroad. The Drug Enforcement Administration has certified that Mr. Dirk A. Lamagno, although driving recklessly under the influence of alcohol, after work hours, and in the company of an identified woman, was acting within the scope of his employment with DEA. Thus once the injured parties complied with 28 U.S.C. § 2675, the district court had jurisdiction under 28 U.S.C. § 1346(b).

Therefore this Court should issue a writ of certiorari so to assure conformity among the circuits in the application of 28 U.S.C. § 2679(d)(1). As well as assure compliance with the intent of Congress in enacting 21 U.S.C. § 904.

Respectfully submitted,

KATIA GUTIERREZ DE MARTINEZ,
EDUARDO MARTINEZ PUCCINI,
AND HENNY MARTINEZ DE PAPAIANI,

By: Isidoro Rodriguez

Isidoro Rodriguez, Esq.
Attorney for Petitioners

LAW OFFICE OF ISIDORO RODRIGUEZ P.C.
Calle 84 No. 56-51
Piso 2, Office 4
Barranquilla, Colombia S.A.
Telephone and Telefax
(011)5758-561678
Virginia Bar No. 21573

APPENDIX-A

IN THE UNITED STATED DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

KATIA GUTIERREZ DE MARTINEZ, EDUARDO MARTINEZ PUCCINI, and HENNY MARTINEZ DE PAPIANI,	)	
Plaintiffs,	)	
v.	)	CIVIL ACTION N0. 93-0055-A
THE DRUG ENFORCEMENT ADMINISTRATION, and THE UNITED STATES OF AMERICA,	)	
Defendants.	)	

ORDER

For reasons stated from the bench, it is hereby ORDERED that the defendats' motion to dismiss is GRANTED, and this case is DISMISSED.

/s/
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
April 20, 1993

APPENDIX-B

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

KATIA GUTIERREZ DE MARTINEZ; EDUARDO MARTINEZ PUCCINI; HENNY MARTINEZ DE PAPAIANI, Plaintiffs-Appellants,	:	
v.	:	No.93-1573
DIRK A. LAMAGNO; DRUG ENFORCEMENT ADMINISTRATION; UNITED STATES OF AMERICA, Defendants-Appellees.	:	

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria.
Claude M. Hilton, District Judge.
(CA-93-55-A)

Submitted: December 2, 1993

Decided: April 28, 1994

Before Hall, Wilkinson, and Williams, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

Isidoro Rodriguez C., LAW OFFICE OF ISIDORO RODRIGUEZ & SIBLEY P.C., Barran-

quilla, Columbia, for Appellant, Kenneth E. Melson, United States Attorney, Rachel C. Ballow, Assistant United States Attorney, Alexandria, Virginia, for Appellees.

OPINION

PER CURIAM:

Appellants Katia Gutierrez de Martinez, Eduardo Martinez Puccini, and Henny Martinez de Papaiani ("Appellants") appeal the district court's dismissal of their personal injury action brought against the Drug Enforcement Administration ("DEA"), DEA Special Agent Dirk A. Lamagno, and the United States pursuant to the Federal Tort Claims Act ("FTCA" or "Act"), 28 U.S.C.A. §2671 (West Supp. 1993). Finding no error, we affirm.

Appellants, citizens of the Republic of Colombia, seek general and special damages for physical injuries and property damage incurred in an automobile accident that occurred on the night of January 18, 1991, in Barranquilla, Colombia. Defendant Lamagno, driving a government-owned Ford Bronco, collided with Appellants' vehicle in an intersection.

Appellants filed an administrative claim with the DEA pursuant to 21 U.S.C. §904 (1988) on May 8, 1991. Because the amount of the claim exceeded the DEA's

limited settlement authority,[1] the claim was referred to the Department of Justice. No final administrative decision has yet been issued on that claim.

In the absence of a final decision on their administrative claim, and to avoid a statute of limitations bar, Appellants filed this action against Lamagno, the DEA, and the United States. The United States Attorney filed a Certification of Scope of Employment and Notice of Substitution of the United States for Defendant Lamagno pursuant to 28 U.S.C.A. §2679(d)(1) (West Supp.1993). The district court substituted the United States for Defendant Lamagno and dismissed Lamagno from the case. Defendants then moved to dismiss the case pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). The district court granted that motion. Appellants appeal.

We review de novo the dismissal of a case pursuant to Fed. R. Civ. P. 12(b)(1) or 12(b)(6). Revene v. Charles County Comm'rs, 882 F.2d 870, 872 (4th Cir.1989). Dismissal is appropriate where it appears beyond doubt that the plaintiff can prove no set of facts to support his allegations. *Id.*

The FTCA acts as a waiver of the United States's sovereign immunity in limited circumstances. However, the Act specifically excludes certain types of claims, preserving the immunity of the United States. One such exclusion is for

---

[1] 28 U.S.C.A. §2672 (West Supp.1993).

"any claim arising in a foreign country." 28 U.S.C. §2680(k) (1988). Accordingly, the United States cannot be subjected to a tort suit of negligence based on an act or omission by an employee or agent of the United States where the claim giving rise to the suit occurred in a foreign country.

The district court properly found that this case falls squarely within the foreign country exception to the Act. It is undisputed that the automobile accident that caused Appellants' injuries occurred in Barranquilla, Colombia, a foreign country. Moreover, the alleged negligence which proximately caused the accident (failure to adhere to local traffic rules and improper operation of a motor vehicle) arose in Barranquilla.

Appellants advance two arguments to avoid the effect of the foreign country exemption from the FTCA. First, Appellants argue that they are entitled to judicial review under 21 U.S.C. §904 (1988). We disagree. Section 904 states:

> Notwithstanding section 2680(k) of Title 28, the Attorney General, in carrying out the functions of the Department of Justice under this subchapter, is authorizedto pay tort claims in the manner authorized by section 2672 of Title 28, when such claims arise in a foreign country in connection with the operation of the Drug Enforcement Administration abroad.

The plain language of §904 makes no provision for judicial review and we will not broadly imply a waiver of sovereign immunity. *United States v. Testan*, 424 U.S. 392, 399 (1975). Moreover, while §904 does make reference to §2680(k) (the foreign country exception to the FTCA) and §2672 (allowing administrative payment of claims under the FTCA), we think it notable that §904 does not reference any other statutory provision suggestive of a judicial remedy. Accordingly, we reject Appellants' attempt to circumvent the foreign country exception by means of §904.

Appellants also contend that their case falls within the "headquarters claim" exception to the foreign country exclusion of the FTCA. Specifically, Appellants maintain that the alleged negligence occurred in the United States and not in Colombia. The district court rejected that argument, as do we.

A headquarters claim exists where negligent acts in the United States proximately cause harm in a foreign country. Such claims typically involve allegations of negligence by agents located in the United States in the guidance of employees who cause damage while in a foreign country, or of activities which take place in a foreign country. *Cominotto v. United States*, 802 F.2nd 1127, 1130 (9th Cir. 1986).

To establish a headquarters claim Appellants must establish a plausible proximate nexus between the acts or omissions in the United States and the re-

sulting damage or injury in a foreign country. *See Eaglin v. United States, Dep't of Army*, 794 F.2nd 981, 983 (5th Cir. 1986). The district court's findings regarding proximate causation is a factual one, subject to a clearly erroneous standard of review. *Cominotto*, 802 F.2nd at 1130. Here, the district court's findings that Appellants failed to demonstrate that the acts or omissions of the United States employees at the DEA Headquarters in Arlington, Virginia, were the proximate cause of the automobile accident in Barranquilla, Colombia is not clearly erroneous.

Appellants cited no authority holding that federal agencies have a duty to provide additional instruction to their employees, properly licensed under state law, before permitting them to operate government vehicles in foreign countries. Thus, the alleged negligence by headquarters personnel is too attenuated to support a headquarters claim in this case. *Eaglin*, 794 F.2nd at 984 n.4. Therefore, we affirm the
district court's order dismissing the case for lack of jurisdiction.

We also affirm the district court's order substituting the United States in place of Defendant Lamagno. The FTCA provides that if the Attorney General certifies that the defendant employee was acting within the scope of his employment, the United States shall be substituted as the party defendant. 28 U.S.C.A. §2679(d)(1).

The law in this Circuit is clear that such a certification is conclusive. *Johnson v. Carter*, 983 F.2nd 1316, 1320 (4th Cir.) (en banc), *cer. denied*, 62 U.S.L.W. 3244 (U.S. 1993). Specifically, we have held that no discretion is given to the district court to review the Attorney General's certification made pursuant to 28 U.S.C.A. §§2679(d)(1), (2). *Johnson*, 983 F.2nd at 1319. Thus, the district court lacked discretion to review the United States Attorney's determination that Lamagno was acting within the scope of his employment at the time of the accident in Colombia. *Id.*

Finding no error, we affirm the district court's orders.[2] We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

AFFIRMED

---

[2]We note that Appellants may yet receive redress for their injuries by virtue of the administrative claim they filed pursuant to 21 U.S.C. §904.